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**Confidential**

<p>Guardian on Behalf of Student, <sup>1</sup></p>  <p>Petitioner,</p>  <p>v.</p>  <p>Public Charter School (“School A”) (Local Education Agency “LEA”)</p>  <p>Respondent.</p>  <p>Case # 2024-0026</p>  <p>Date Issued: May 26, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p>  <p>Hearing Date: May 15, 2024 May 16, 2024</p>  <p>Counsel for Each Party listed in Appendix A</p>  <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is in the attached Appendices A & B.

## **JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations (“DCMR”), Title 5 Chapter 5-A30.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing ("Student") resides with Student's grandparent and guardian in the District of Columbia and attends a public charter school (“School A”) located in the District of Columbia that is its own local education agency ("LEA"). Student has been determined eligible for special education pursuant to IDEA with a disability classification of multiple disabilities ("MD"), including specific learning disability (“SLD”) and emotional disability (“ED”). Student began attending School A at the start of school year (“SY”) 2023-2024.

On February 12, 2024, Student’s grandparent (“Petitioner”) filed a due process complaint ("DPC") alleging that School A (“Respondent”) denied Student a free appropriate public education ("FAPE") by failing, inter alia, to provide Student sufficient behavior interventions including the development of a behavior intervention plan (“BIP”) and by initiating a change of Student’s education placement to a non-public special education day school. Petitioner maintains that Student’s least restrictive environment (“LRE”) remains an educational placement in the general education setting.

Petitioner seeks as relief a finding that Student has been denied a FAPE and that School A be ordered to fund an independent, comprehensive functional behavior assessment (“FBA”) and develop a BIP, and crisis plan, compensatory education, and Student’s return to a general education placement.

### **LEA’s Response to the Complaint:**

School A filed a response to the DPC on February 29, 2024. In its response, DCPS stated, inter alia, the following:

School A immediately began implementing Student's IEP and attempted to collect data to inform decision-making, but the student's attendance was inconsistent. Within one week of the start of the school year, Student was hospitalized and missed multiple days of school. Almost immediately upon return to school from this hospitalization, Student went into crisis and assaulted four staff members. As a result, Student was again taken to the hospital and also suspended for three days. Student was eligible to return from suspension on September 25, 2023, but did not. Student was hospitalized again for over a week and missed several more days of school until Student was hospitalized for a third time on November 16, 2023.

School A convened an IEP meeting on November 15, 2023 and updated Student’s IEP with the data that it had from Student’s time at School A. In a follow-up meeting held on November 28,

2023, School A proposed to conduct a neuropsychological evaluation and a functional behavior assessment due to concerns about Student's social-emotional and behavioral functioning. School A requested to collaborate with the providers at the hospital where Student had been admitted. Those providers were unwilling to do so.

The team met again on December 6, 2023, to plan for Student's return to School A upon discharge from the hospital. Student returned, and shortly thereafter, Student's crises continued, resulting in another hospitalization. As a result of these ongoing and escalating crises at school, School A began the change in placement process and proposed that Student be placed in an interim alternative educational setting, as School A no longer believed it could keep Student safe and that maintaining placement at School A was substantially likely to result in injury to Student or others.

Student missed forty days of school before the December winter break, making it nearly impossible for the school to collect data or to complete the evaluation process. School A developed Student's IEP in November 2023 reasonably calculated to enable Student to make appropriate progress based on the information available to the team at the time.

School A began the process of comprehensively evaluating Student. School A denies that it failed to conduct an FBA or provide behavioral interventions to accommodate Student's disability-related behavior. School A has been attempting to complete an FBA since November 28, 2023, but that process has been delayed in part due to Student's unavailability.

School A denies that it failed to provide Student FAPE in the least restrictive environment. Student has been in a consistent state of crisis since the start of the school year and School A has worked hard to support Student despite Student's inconsistent attendance. It is apparent from the frequency and escalation of these crises that Student's needs cannot be met in a general education setting. The IEP team met on January 31, 2024, and determined over Petitioner's objection that Student requires placement in a non-public special education day school. Student's crises have become so severe that School A appropriately determined that it cannot safely maintain Student's placement at School A and School A is unable to meet Student's behavioral and mental health needs.

### **Resolution Meeting and Pre-Hearing Conference:**

Petitioner and DCPS participated in a resolution meeting on February 27, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The DPC was filed on February 12, 2024. The 45-day period began on March 13, 2024, and ended [and the Hearing Officer's Determination ("HOD") was initially due on April 27, 2024. The impartial hearing officer ("IHO") offered April 16 & 17, 2024, for hearing dates. The parties/witnesses were unavailable, and the parties chose the hearing dates noted below. An unopposed motion to continue the hearing date and extend the HOD due date to was granted for 29 calendar days. The HOD is now due May 26, 2024.

The undersigned impartial hearing officer ("IHO") conducted a pre-hearing conference on March 7, 2024, and issued a pre-hearing order ("PHO") on March 19, 2024, stating, inter alia, the issues to be adjudicated.

### **Petitioner's Motion to Withdraw:**

On May 8, 2024, Petitioner's counsel filed a motion to withdraw with prejudice three of the five issues that were asserted in Petitioner's DPC and outlined in the March 19, 2024, PHO. Petitioner acknowledged in the motion that those three issues had been resolved in the parties' partial resolution agreement. Respondent did not oppose the motion. At the outset of the hearing on May 15, 2024, the IHO addressed the motion and, on the record, orally dismissed with prejudice the three issues that Petitioner requested be dismissed.<sup>2</sup> Accordingly, only the remaining two issues are noted below:

### **ISSUES:**

The issues adjudicated are:

1. Did School A deny Student a FAPE by failing to conduct an FBA and provide behavior interventions to address Student's disability-related behaviors?
2. Did School A deny Student a FAPE by failing to provide Student an appropriate LRE in general education rather than a separate day school?

### **RELEVANT EVIDENCE CONSIDERED:**

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 25, Respondent's Exhibits LEA 1 through 16 and Joint Exhibits 1 through 11) that were admitted into the record and are listed in Appendix 2.<sup>3</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>4</sup>

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<sup>2</sup> The following issues were dismissed with prejudice:

1. Did School A deny Student a FAPE by failing to develop an appropriate IEP based on adequate assessment data?
2. Did School A deny Student a FAPE by failing to provide Student any access to education between January 8, 2024, and January 30, 2024, and on January 30, 2024, January 31, 2024, February 1, 2024, and February 12, 2024?
3. Did School A deny Student a FAPE by failing to timely provide Petitioner access to educational records?

<sup>3</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

<sup>4</sup> Petitioner presented four witnesses: (1) Student's grandmother (Petitioner), (2) A Parent Support Specialist, (3) OSSE's Senior Change in Placement Coordinator, and (4) an Independent Clinical Psychologist, who testified as an expert witness. Respondent presented four witnesses: (1) School A's School Psychologist, (2) Student's Special Education Teacher, (3) a Second School A Special Education Teacher, and (4) School A's Director of Student Services. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

## **SUMMARY OF DECISION:**

Petitioner held the burden of persuasion on issue #1. After Petitioner presented a prima facie case on issue #2, Respondent held the burden of persuasion on issue #2. The IHO concluded that Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #1 and Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue #2. The IHO ordered School A to review the FBA it has already completed, review Student's current IEP to include appropriate behavioral support goals and services, develop and implement a BIP for Student, return Student to general education in School A's \_\_\_\_ program, and conduct a review Student's IEP and LRE in forty-five (45) school days following implementation of the behavior interventions and BIP noted in the order. The IHO granted Petitioner an independent educational evaluation ("IEE") to determine appropriate compensatory education for the denials of FAPE.

## **FINDINGS OF FACT:<sup>5</sup>**

1. Student resides with Petitioner, in the District of Columbia. School A is Student's LEA. Student has been determined eligible for special education pursuant to IDEA with a disability classification of MD, including SLD and ED. Student is currently in \_\_\_\_ grade and at the start of SY 2023-2024 began attending School A.
2. During SY 2022-2023 Student attended a different public charter school ("School B") for SY 2022-2023 only. Upon Student's enrollment in School A, at the start of SY 2023-2024, School A had Student's School B amended individualized educational program ("IEP") dated July 14, 2023. Student's disability classification at the time was SLD. Student's School B IEP under the section entitled "Positive Behavior Interventions and Support" specifically stated that Student's behavior did not impede Student's learning or that of other children. The IEP included social emotional and behavioral goals and prescribed 240 minutes per month of behavioral support services outside the general education setting, along with five hours per week of specialized instruction, with one of those hours outside the general education setting. (Joint Exhibit 1)
3. Student's School B IEP stated the following in the present levels of performance ("PLOP") in the area of emotional/social/behavioral development ("ESBD"): "[Student] is a delight to work with as [Student] is quite congenial and easy to engage. According to [Student's] records, [Student's] disability is defined as SLD with documented ADHD. The current clinician has observed that [Student] struggles with attending, displaying inattentiveness and/or avoidance of task requiring sustained attention in which [Student] rushes through to complete. Student is easily distracted, fidgets/taps due to hyperactivity, makes impulsive decisions that put [Student] at risk, and will abruptly leave the classroom without permission when feeling overwhelmed." (Joint Exhibit 1)

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<sup>5</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

4. The ESBD PLOP also noted that School B had two teachers rate Student on a school behavior scale with varied results. The PLOP states: “Based on the outcomes of the rating scales, information gathered from Student’s classroom support staff, and observations by the current social worker, Student would benefit from behavioral support services to develop skills (i.e., social IQ) to appropriately interact with peers as well as improve interpersonal relationships. Student could also develop strategies/skills to improve self-esteem and reduce inappropriate attention seeking behaviors. Moreover, Student will benefit by developing skills to self-regulate thereby combating impulsivity and behaviors that put Student and others at risk. Lastly, Student would benefit by improving upon coping skills to manage mood as well as to appropriately respond/react in stressful situations.” (Joint Exhibit 1)
  
5. The IEP described how Student’s disability affected Student’s access to and progress in the general education curriculum and included two ESBD goals and baselines as noted below:

<p><b>Description of how the student’s disability affects the student’s access to the general education curriculum:</b> [Student’s] behaviors hinder [Student] from attending, often making choices that interfere with [redacted] ability to focus while in school/class, thereby hindering [Student’s] access to the general education curriculum.</p>	<p><b>Description of how the student’s disability affects the student’s progress in the general education curriculum:</b> [Student’s] behaviors resulting from [Student’s] disability adversely impact the student’s choices and hinder [Student’s] progress in the general education curriculum.</p>	
<p><b>Annual Goal 1:</b> [Student] will demonstrate the ability to recognize appropriate pro-social behaviors to include utilizing appropriate- ate/responsible boundaries and rate [Student’s] own behavior as part of [Student’s] self-monitoring system with 80% accuracy as compared to a risky behavior checklist.</p>		
<p><b>Baseline:</b> [Student] often exhibits impulsive and inappropriate behaviors that are risky and often cause social ridicule, which makes [Student] feel rejected and embarrassed and interferes with [Student’s] ability to gain access to the general education curriculum.</p>	<p><b>Anticipated Date of Achievement:</b> 01/11/2024</p>	<p><b>Evaluation Procedures and Schedule:</b> <i>Observation / At Opportunity</i> <i>Verbal Response / At Opportunity</i></p>
<p><b>Annual Goal 2:</b> When [Student] i becomes upset, frustrated, or angry, [Student] will use a self-regulation/coping strategy (movement break, deep breathing, quiet space break, mindfulness, etc.) to avoid engaging in inappropriate behavior with one reminder, on 4 out of 5 opportunities, as measured by observations and documentation.</p>		
<p><b>Baseline:</b> When experiencing moments of distress, [Student] will leave the classroom without informing the teacher and/or without informing any staff member where [Student] is going. In addition, [Student] doesn’t employ self-regulation/coping strategies but flees the situation.</p>	<p><b>Anticipated Date of Achievement:</b> 01/11/2024</p>	<p><b>Evaluation Procedures and Schedule:</b> <i>Observation / At Opportunity</i></p>

(Joint Exhibit 1)

6. Petitioner chose to enroll Student in School A because of School A's college preparatory program and its counseling services, which includes individual and group counseling, behavioral supports and intervention and crisis intervention. (Petitioner's testimony, Petitioner's exhibit 4)
7. School A is a co-educational \_\_\_\_\_ school. School A students \_\_\_\_\_ . School A students are granted permission for short durations to \_\_\_\_\_ attend School A's \_\_\_\_\_ program \_\_\_\_\_. School A's provides programming for its students \_\_\_\_\_. (Witness 7's testimony)
8. Student has been diagnosed with several mental health conditions, including Attention-Deficit Hyperactivity Disorder ("ADHD"), Dysthymia, Bipolar Disorder, and Schizoaffective Disorder Bipolar Type. Student takes medication and has received community-based mental health services. (Petitioner's testimony, Petitioner's Exhibits 1, 2)
9. SY 2023-2024 began for School A on Monday, August 28, 2023. During Student's first week of attending School A, Petitioner was vacationing out of the country and left Student in the care of Student's uncle. During the time Petitioner was away, Student did not take Student's prescribed medication. (Petitioner's testimony, Petitioner's Exhibit 3)
10. On September 1, 2023, engaged in an behavior incident at School A and as a result was transported from School A to Children's National Medical Center ("CNMC"). Student was discharged the same day, and CNMC provided a letter indicating that Student was cleared to return to school the following school day, with "no limitations." (Petitioner's Exhibit 5)
11. On September 5, 2023, School A staff requested that Petitioner pick up Student from school in the middle of the day due to suicidal ideations. School A did not permit Student to return for approximately the next eight school days. Student returned to school on September 18, 2023. (Petitioner's testimony, LEA Exhibit 3)
12. On September 19, 2023, Student engaged in disruptive behaviors including fighting with another student and threatening and hitting school staff members. School A contacted Petitioner and asked her to pick Student up from school. Petitioner took Student to CNMC. CNMC released Student the same day and cleared Student to return to school in 1 to 2 days. As a result of the incident School A initiated a three day out-of-school suspension of Student. (Petitioner's testimony, Joint Exhibits 4, 5, Petitioner's Exhibit 9)
13. Between September 26, 2023, and October 3, 2023, Student was admitted to the Psychiatric Institute of Washington ("PIW") after an incident that occurred outside of school. At discharge, PIW provided a letter indicating that Student was "medically and psychiatrically stable" to return to school on October 4, 2023. School A informed Petitioner that Student could not return before a meeting was held. (Petitioner's testimony, Petitioner's Exhibits 11, 13)

14. Student attended school from October 12, 2024, to October 23, 2024, with only one recorded absence and no recorded behavioral incidents. School A called Petitioner to pick up Student from school on October 24, 2024, because Student was having a bad day. Student did not return to school on October 25, 2023, through October 27, 2023, and returned to school on October 30, 2023. (Petitioner's testimony, Petitioner's Exhibit 14-2)
15. On November 8, 2023, Student became agitated when waiting to receive medication from the School A nurse. Student went to the school lobby and started to rearrange furniture and be verbally aggressive. Student allegedly acquired push pins and "attempted to self-harm." Student allegedly threw a rock at a glass door. School A called D.C.'s Child and Adolescent Mobile Psychiatric Services ("ChAMPS") and the police. Student was transported to CNMC and released the same day. (Petitioner's testimony, Joint Exhibit 5-10, Petitioner's Exhibit 16))
16. On \_\_\_\_November\_\_\_\_, 2024, Student returned to school after the weekend\_\_\_\_. School A staff stated that Student was not "cleared" \_\_\_\_ for school. Student began tossing chairs and taking tacks off the bulletin board and attempting to self-harm, as well as making verbal threats. School A called the police. Student was handcuffed and transported to CNMC and released the next day with a letter clearing Student to return to school the next day. (Joint Exhibit 5-11, 5-12, Petitioner's Exhibits 15, 16)
17. School A did not permit Student to return to school and informed Petitioner that Student would not be able to return until a re-entry meeting could be held. (Petitioner's Exhibits 17, 18)
18. On November 15, 2023, Petitioner attended an IEP meeting at School A. School A developed an IEP following the November 15, 2023, meeting that provides five hours per week of specialized instruction in math in the general education setting, five hours per week of specialized instruction in reading, also in general education, and four hours per month of behavioral support services outside of the general education setting. The IEP indicates that Student's behavior impedes Student's learning or that of other children. (Joint Exhibit 2)
19. On November 16, 2024, Student was voluntarily admitted to PIW after meeting with Student's psychiatrist. Student remained hospitalized at PIW for two and a half weeks. (Petitioner's testimony)
20. On November 21, 2023, Petitioner attended a re-entry meeting at School A to discuss Student's return to school. School A informed Petitioner that School A could not support Student and the school team intended to send a justification to the D.C. Office of the State Superintendent of Education ("OSSE") to facilitate a placement for Student to a non-public school. (Petitioner's testimony, Joint Exhibit 6)



21. On November 27, 2023, School A proposed to place Student in an interim alternative educational setting (“IAES”) while School A initiated the change-in-placement process with OSSE. On November 28, 2024, the IEP team met to discuss School A’s proposal and Student’s return to school. The IEP team agreed to permit Student to attend [REDACTED] regularly scheduled classes rather than an IAES, but Student would not yet be permitted to return \_\_\_\_\_ program. The team agreed to meet again when Student was discharged from PIW. The IEP team also noted that it lacked adequate data and information about Student, and agreed to conduct an FBA and a neuropsychological evaluation and to schedule an IEP meeting to update Student’s IEP as needed. (Petitioner’s testimony, Petitioner’s Exhibit 19)
22. On December 6, 2023, Student was discharged from PIW. PIW provided a letter indicating that upon discharge, Student would be “medically and psychiatrically stable to return to school on 12/7/23.” Petitioner notified School A that Student had been discharged and provided Student’s discharge paperwork. (Petitioner’s testimony, Petitioner’s Exhibit 20)
23. The IEP team met December 6, 2023, and agreed that Student would return to school the following day. On December 7, 2023, Student returned to School A’s \_\_\_ program in regular classes. (Petitioner’s testimony)
24. On December 13, 2023, Student became upset while in class and threw a trash can in the hallway, went to the school lobby, cursed and attempted to hit a staff member. Student was eventually able to de-escalate and return to class. (Joint Exhibit 5-16)
25. On December 14, 2023, Student began tearing up paper and becoming “loud.” School A called Petitioner who was able to help Student deescalate by talking with Student over the phone and Student returned to class. (Joint Exhibit 5-18)
26. On December 18, 2023, Student became upset, ran to the school lobby, and turned over and broke a glass table and that threw a glass tabletop at, and narrowly missed, a staff member. School A called police, who transported Student to CNMC. Student was released from the hospital the same day. (Petitioner’s testimony, Joint Exhibit 5-19, Witness 7’s testimony)
27. On December 19, 2023, Student was admitted to PIW after an incident that occurred outside of school. Student remained at PIW for approximately two weeks. (Petitioner’s testimony, Petitioner’s Exhibit 20)
28. On December 20, 2023, the IEP team met again. School A indicated that there was no formal behavior intervention plan in place, and that a functional behavioral assessment had not yet been conducted due to Student’s absences from school. (Petitioner’s testimony)
29. School A also indicated that the neuropsychological evaluation had not yet been scheduled. School A again proposed that an IAES be put in place following Student’s release from PIW and indicated that it felt a change in placement was necessary. Petitioner

communicated her disagreement with any change in placement without first gathering data of Student's behavior and conducting updated evaluations. (Petitioner's testimony)

30. On January 3, 2024, Student was discharged from PIW. On January 5, 2024, Petitioner agreed to School A's revised proposal to provide Student with an interim setting with in-person instruction and behavioral support services. (Petitioner's testimony)
31. On January 24, 2024, OSSE held a change in placement ("CIP") meeting. The OSSE placement coordinator recommended that the IEP team maintain Student's placement at School and pointed out that the IEP team had not collected sufficient data on Student's behavior, had not put a behavior intervention plan in place, and had not exhausted its available resources to serve Student in the general education setting. (Witness 2's testimony, Petitioner's Exhibit 22)
32. School A members of the IEP team elected to change Student's placement to a non-public day school, over Petitioner's objection and the OSSE placement coordinator's recommendation. School A staff members who participated in the CIP meeting believed Student needed a therapeutic school setting outside general education, that Student posed a significant danger to self and others and Student's social/emotional and behavioral needs were beyond School A's current capabilities to manage. (Witness 4's testimony, Witness 5 testimony, Witness 6, testimony, Witness 7's testimony)
33. On February 17, 2024, School A completed Student's neuropsychological evaluation. (Joint Exhibit 10)
34. On March 7, 2024, School A convened an eligibility meeting at which the neuropsychological evaluation was reviewed. The team determined Student eligible under the classification of MD to include both SLD and ED. (LEA Exhibit 10)
35. School A has continued Student in the interim education setting with one-to-one instruction and continued to provide Student behavior support services. Although School A has completed an FBA and developed a proposed BIP, those have yet to be reviewed by a team and Student's IEP updated. Student has not had any additional incidents of property destruction. Student has been put on notice by School A that any property destruction will be charged to Student's grandmother, who will have to pay for any damages to the school property that Student causes. (Witness 4's testimony, Witness 5 testimony, Witness 6, testimony, Witness 7's testimony, LEA Exhibits 11, 12, 13, 14)

### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making

process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;  
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5A DCMR §3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

Petitioner held the burden of persuasion on issue #1. Once Petitioner presented a prima facie case, on issue #2, Respondent held the burden of persuasion on that issue.<sup>6</sup> The burden of persuasion shall be met by a preponderance of the evidence.

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<sup>6</sup> DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Did School A deny Student a FAPE by failing to conduct an FBA and provide behavior interventions to address Student's disability-related behaviors?

**Conclusion:** Petitioner sustained the burden of persuasion by a preponderance of the evidence that School A denied Student a FAPE by failing to provide sufficient behavior interventions by conducting an FBA and implementing a BIP.

34 C.F.R. §300. 324 (a) (2) provides: The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.

Functional Behavior Assessment or "FBA" refers to a systematic set of strategies used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. See *Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017) See, also, Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.) An LEA's failure to complete an FBA and develop a Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. See, e.g., *Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

While an FBA is the "primary way" for an LEA to "consider the use of positive behavioral interventions and supports," it is not the only way. *Simms v. Dist. of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at \*14 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018)

IDEA does not mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions do not apply to this case.

The evidence demonstrates that prior to Student attending School A, Student's was successful in a general education setting with some specialized instruction and behavioral support. Student began attending School A for the first year of \_\_\_\_\_ school on an apparently ill-prepared footing. Not only was Student in a college prep curriculum at School A, but in a \_\_\_\_\_ school that required its students to participate in programming \_\_\_\_\_. In addition, at the start of Student's attendance at School A, Student was apparently not taking Student's prescribed psychotropic medication.

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(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

Within the first week of school, Student's in-school behavior resulted in Student being briefly psychiatrically hospitalized. School A met with Petitioner and realized that Student's behavior difficulties were likely due to medication mismanagement, and Student returned to school. School A acknowledged the need to gather data on Student's social/emotion needs. However, over the next few weeks, Student's had additional behavior incidents, including what School A believed to be suicidal ideations. Student was again hospitalized, resulting in significant absences from school.

Both Student's School B IEP and the November 2023 IEP that School A developed prescribed behavior support services. Petitioner in her DPC did not assert that Student's IEP behavior supports services were not provided. Petitioner asserts that in addition, School A should have provided Student an FBA and a crises intervention plan to address the behaviors that would have allowed Student to stay in the general education classroom.

Although Petitioner, through her representatives, requested that School conduct an FBA, School asserts that due to Student's absences, it was unable to conduct evaluations. The IHO is unconvinced by School A's assertions in this regard. IDEA only mandates an FBA or BIP in a limited instance; however, the evidence in this case of Student's significant behavior difficulties and suicidal ideations certainly warranted an FBA being conducted and BIP being developed.

Petitioner alleges that an FBA should have been conducted at latest by November 2023, when School A convened Student's IEP meeting. The evidence demonstrates that there were periods in October and December, although brief, when Student was attending school and did not behavioral incidents. These were periods in which School A could have, but did not, take action to evaluate Student and conduct an FBA that could have resulted in a BIP.

Student was voluntarily hospitalized by Petitioner for an extended period to stabilize Student and administer the appropriate medication. Upon Student's return to school Student engaged in behaviors that caused School A staff to believe that Student's social emotional needs required at therapeutic setting beyond School A's capabilities to provide. It was the incident in mid-December 2023, that seems to have broken the proverbial "camel's back" on School A's tolerance for Student's behavior and led the school staff to conclude that Student needs a more restrictive setting. From that juncture School A initiated the CIP meeting with OSSE, and despite both OSSE's recommendation against, and Petitioner's opposition to, a change in placement, School A has concluded that Student's LRE is non-public day school without first initiating the behavior interventions that Petitioner and her representatives have urged.

Although School A eventually was able to conduct a neuropsychological evaluation and an FBA and develop a proposed BIP, these things have been developed while Student has remained in an interim educational setting outside of general education with one-to-one support while the change of placement was pursued, and this litigation has been pending. The IHO is not convinced that School A should have conducted an FBA and implemented a BIP as of the November 2023 IEP meeting as Petitioner asserts. However, the FBA and BIP could have been developed and reviewed by a team and implemented during the months that Student's has remained at School A in an interim educational setting. As a result of School A's failure to act to at least conduct an FBA and develop a BIP, the IHO concludes that School A denied Student a FAPE.

**ISSUE 2:** Did School A deny Student a FAPE by failing to provide Student an appropriate LRE in general education rather than a separate day school?

**Conclusion:** School A did not sustain the burden of persuasion by a preponderance of the evidence that it denied Student a FAPE by failing to maintain Student's LRE is general education prior to its instituting sufficient behavior interventions.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[ ] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

The second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is

reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP offered was reasonably calculated to enable the specific student’s progress. . . . “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Although School A has yet to convene an IEP meeting to officially amend Student’s IEP to prescribe an LRE in an out of general education setting in a non-public special education day school, School A has initiated that change in Student’s LRE. Petitioner asserts that by changing Student’s placement to a significantly more restrictive environment—a non-public day school—without first attempting to accommodate Student’s disability- related behavior and provide Student with sufficient school-based behavior interventions, School A is denying Student a FAPE.

Based on the reasoning in the issue above, the IHO concludes that School A’s decision to change Student’s LRE and educational placement to a non-public therapeutic day school is premature and at this juncture inappropriate without School A having first conducted an FBA and developed a BIP to address Student’s behaviors.

Despite what may have been reasonable initial steps taken by School A, such as pausing the Student's participation in its \_\_\_\_\_ program and providing one-to-one instruction and behavior support services, the premature decision to change the Student's LRE to a significantly more restrictive setting without first conducting an FBA and developing and implementing a BIP denied the Student a FAPE.

## Remedy

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The IHO has concluded that DCPS denied Student a FAPE by failing to timely conduct an FBA and implement a BIP and return Student to the general education setting.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Absent sufficient evidence of what services would compensate Student for the period that Student has been outside the general education setting in an inappropriate LRE and lacking an FBA and BIP, the IHO concludes that an IEE is appropriate to determine what, if any, compensatory services are warranted.

## ORDER:

1. The three issues noted in the March 19, 2024, PHO that Petitioner withdrew in her May 8, 2024, motion are hereby dismissed with prejudice.
2. School A shall, within ten (10) business days of the date of this order, if it has not already done so, review the FBA School A conducted, review Student's current IEP to include appropriate behavioral support goals and services, develop and implement a BIP for Student and return Student to general education in School A's \_\_\_\_ program.
3. School A shall, in forty-five (45) school days of the date of this order, conduct a review of the effectiveness of behavior interventions and the BIP noted in this order and review the appropriateness of Student's IEP and LRE.



4. School A shall, within fifteen (15) business days of the date of this order, provide Petitioner authorization and funding for an independent educational evaluation (“IEE”) at the OSSE prescribed rate to determine appropriate compensatory education for the denials of FAPE noted in this HOD.
5. Petitioner is authorized to pursue compensatory education by filing a subsequent due process complaint if the parties do not agree on the amount of compensatory education for the denials of FAPE noted in this HOD.
6. All other relief requested by Petitioner is denied.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Impartial Hearing Officer**  
**Date: May 26, 2024**

Copies to: Counsel for Petitioner  
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